amount equal to such dividends.....may be charged at a lower rate or not charged with any tax as the Comptroller shall determine."

The respondents maintain that the words "may be charged must be construed to mean "shall be charged". The appellant, however, contends that if the Legislature intended the words "may be charged" to be construed as "shall be charged", they would have used the words "shall be charged", and maintains that the Comptroller has an absolute discretion to refuse to charge at a lower rate and to refuse not to charge with any tax at all. In other words, he has a discretion to charge at the full rate of thirty per cent. Clearly, the Comptroller has some discretion as he may at any rate charge at a lower rate or not charge with any tax as he shall determine. There is nothing in the proviso to section 39 to guide the Comptroller as to how to fix the lower rate if he decides to charge at a lower rate. It would, therefore, appear that if it was intended that the Comptroller must charge either at a lower rate or not charge with any tax the Comptroller could evade the intention of the Legislature by charging at the rate of 29½ per cent instead of thirty per cent, and from such a charge there would appear to be no appeal. He clearly has some discretion under the proviso to section 39 and section 39 is not referred to in section 30 which gives a right of appeal in respect of the exercise of a discretion in certain cases.

The question as to whether the donee of a power may either exercise it or leave it unused was fully discussed in the case of *Julius v. Oxford (Lord Bp.)*[1]. In that case the words discussed were "it shall be lawful" and it was held that the use of these words gave the Bishop complete discretion to issue or decline to issue a commission. The principle involved in construing enabling words are set down shortly in one sentence by Lord Blackburn at page 244 as follows :—

"The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."

The question, therefore, arises as to whether the proviso to section 39 confers a legal right upon the respondents. I have come to the conclusion that the Legislature must have intended to confer a legal right and that if the Comptroller were to arbitrarily fix a lower rate there would be a right of appeal under section 75 of the Ordinance to the Board of Review.

It now becomes necessary to consider whether the dividends paid in 1950 were paid out of the chargeable income for 1951. In order to do this, it is necessary, in the first place, to consider what is the meaning of the words "chargeable income". I agree with the view of the Committee of the Board that these words which appear in section 39 paragraph (a) and the proviso to that section have the same meaning as the same words which appear in section 34 of the Ordinance. That section reads as follows :—

"The chargeable income of any person for any year of assessment shall be the remainder of his assessable income for that year after the deductions allowed in this Part of this Ordinance have been made."

It now becomes necessary to consider the meaning of the words "assessable income". Section 33(1) of the Ordinance reads as follows :—

"The assessable income of any person from all sources chargeable with tax under this Ordinance for any year of assessment shall be the remainder of his statutory income for that year after the deductions allowed in this Part of this Ordinance have been made."

In section 31(1) "statutory income" is defined as "the full amount of income for the year preceding the year of assessment".

In view of these definitions I am of opinion that the Committee of the Board were right in finding that assessable income after the deductions allowed in section 34 becomes chargeable income for the purposes of section 39 of the Ordinance and that the chargeable income of the respondents for the year of assessment 1951 was the statutory income of the trading year 1950.

In these circumstances, I agree with the Committee that the dividends paid in 1950 were paid out of the chargeable income for the year of assessment 1951.

The respondents being aggrieved and having appealed to the Board, I am of opinion that the Committee were entitled to order that the assessment be adjusted so as to charge at twenty per cent per annum, an amount equal to the amount of the dividends paid in 1950.

The appeal to this Court must be dismissed with costs.

Appeal dismissed.

MAH KOK CHEONG v. R.

[A. Cr. J. (Spenser Wilkinson, J.) February 13, 1953]

[Penang — Criminal Appeal No. 5 of 1953]

Criminal trial — Burden of proof — Question to be asked by trial Magistrate in coming to decision.

The appellant in this case was originally charged in the Sessions Court with forgery of a railway receipt. After hearing the evidence for the prosecution the learned President amended the charge to one under section 420 of the Penal Code and the amended charge read as follows:—

"That you on 22nd October, 1951, at Prai, cheated a Railway Clerk Ismail by representing to him that you were the consignor of goods and thereby dishonestly induced him to cause to be delivered to you 20 bundles of tin plates valued about $2,000, the property of Chop Nam Poh Hin, an offence under section 420, Penal Code."

The appellant claimed trial to the amended charge and after hearing his defence the learned President

convicted him and sentenced him to nine months' rigorous imprisonment and a fine of $1,000 or six months' rigorous imprisonment in default.

One of the grounds of appeal was as follows:—

"(c) The learned President should have accepted the explanation given by Your Petitioner because such explanation could reasonably be true and was consistent with innocence and with the evidence of P.W. 9."

Held: the considerations which arise when an accused is found in possession of recently stolen goods are not applicable to other cases and in ordinary criminal cases the sole question which a subordinate Court has to ask itself at the conclusion of the trial is — Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt?

Cases referred to:—

(1) *Mohamed Yatin v. Public Prosecutor* (1950) M.L.J. 57; (1950), 1 M.L.R. 7.

(2) *R. v. Carr-Briant* (1943) 2 All E.R. 156; 29 Cr. App. R. 76.

(3) *R. v. Abramovitch* 24 Cox C.C. 591.

(4) *R. v. Garth* (1949) 1 All E.R. 773; 33 Cr. App. R. 160.

(5) *R. v. Aves* 34 Cr. App. R. 159; (1950) 2 All E.R. 330.

(6) *Wang Kia Heng v. Public Prosecutor* (1951) M.L.J. 109; (1951), 2 M.L.R. 119.

CRIMINAL APPEAL.

Lim Kheng Kooi for the appellant.

C. M. Sheridan (D.P.P.) for the respondent.

Spenser Wilkinson, J. : — Before I deal with the merits of this case I should like to deal with Ground (c) of the Grounds of Appeal. There is one passage in the judgment in the case of *Mohamed Yatin v. Public Prosecutor*[1] which seems to have caused some difficulty. It is as follows :—

"In an ordinary case, where no special burden of proof or explanation is by law cast upon the accused, his position is more favourable than it is in those cases where the law presumes something against him."

I think that this sentence should be understood as referring back to the earlier part of the previous paragraph where it is stated that in certain cases "the accused discharges the burden upon him if he establishes a balance of probability in his favour". I think this makes it clear what the second passage means.

There are really three classes of criminal cases to be considered :—

(a) The ordinary case where direct or circumstantial evidence is given to prove that the accused committed the offence charged. In such cases if the defence raises a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt there will be an acquittal, and if no such doubt is raised, a conviction.

(b) Where the law casts the burden of proof upon the accused, so that the accused has to establish a probability in his favour — for example, in those cases where an accused relies upon an exception in the Penal Code, and in the kind of cases represented by the case of *Rex v. Carr-Briant*[2] where the Court will presume something against the accused unless the contrary be proved.

(c) Cases of theft or receiving where the *only* evidence against the accused is the possession of property recently stolen. These cases are really in a class by themselves — they may be looked upon not so much as cases where the law has cast a burden of proof upon the accused, but rather as cases where the law has given special significance to a certain class of circumstantial evidence, namely, the possession of stolen goods. The law is that such possession is in itself evidence of the theft or receiving unless explained; and the numerous decisions dealing with the subject, from *Rex v. Abramovitch*[3] onwards until the recent decisions of *Rex v. Garth*[4], *Rex v. Aves*[5] and *Wang Kia Heng v. Public Prosecutor*[6] are all concerned with the degree of explanation which will entitle the accused to an acquittal.

I thought the decision in *Mohamed Yatin's* case had made the position clear, but from various cases recently before me it does not appear to have done so. I must, therefore now repeat that in ordinary criminal cases such as perjury, forgery, cheating and so on where no question of unlawful possession of property arises all discussion as to what might reasonably be true or what is consistent with innocence are both irrelevant and misleading. Almost every defence put forward by an accused is consistent with innocence or it would not be put forward; nor would it be a very good defence if it could not reasonably be true. But whatever may be the defence to a criminal charge the *sole* question which a Subordinate Court has to ask itself at the conclusion of the trial is — Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt? I say "the sole question" advisedly because in this country the accused will not have been called on for a defence at all unless the prosecution have first proved a case. In this respect our criminal procedure differs from that in England and this difference makes it necessary to apply with caution the English decisions which almost all deal with trials by jury.

I hope I have said enough to ensure that in future Counsel will not either in this Court or in the Lower Courts put forward arguments based upon *Rex v. Abramovitch*[3] and similar decisions in cases which have nothing to do with the possession of stolen goods.

I have read this record with some care and have listened to Mr. Lim Kheng Kooi's arguments; but the learned President saw the witnesses and heard them give evidence and I can see nothing wrong in his Grounds of Decision. It appears to me that the accused's defence did not raise a doubt in his mind and, therefore, I think the conviction is right.

With regard to the sentence, it seems to me that the learned President has taken into consideration that there were other people concerned in this matter and I find it impossible to say that in an offence of cheating whereby 20 bundles of tin plates valued at about $2,000 disappeared the sentence imposed can be said to be manifestly excessive. For these reasons the appeal must be dismissed.

Appeal dismissed.

ISMAIL BIN HUSSIN v. PUBLIC PROSECUTOR.

[C. A. (Mathew, C.J., Wilson and Taylor, JJ.) January 24, 1953]

[K.L. — F.M. Criminal Appeal No. 106 of 1952]

Murder — Penal Code, s. 300 — Construction — Intention to cause death — Effect of challenge — Proof of identity of body.

The intention required to constitute murder is not necessarily an intention to kill an identified person. An actual intention to kill a human being, though formed on impulse and on suspicion that the person is a terrorist, is in law a murderous intention.

A challenge has no legal effect of its own; it is merely a fact which may be relevant to the state of mind of the accused.

It is the duty of the prosecution to prove strictly the identity of the body examined, post mortem.

Case referred to:—

(1) *Fazal Din v. Public Prosecutor* (1949) M.L.J. 123.

COURT OF APPEAL, CRIMINAL.

C. O. G. Gould for the appellant.

P. G. Clough (D.P.P.) for the respondent.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

The judgment of the Court of Appeal was delivered by:—

Taylor, J.: — This appellant was convicted of the murder of one Omar and also of the attempted murder, in the same incident, of a man named Rifin.

The appellant, who is a member of the Home Guard at Kanjat in the Ulu Dungun district of Trengganu, went out about dawn intending to go to his padi land. He was accompanied by a friend. Both carried shot guns. They went along one of two paths near a river. When they had gone about half a mile the appellant waited in a patch of secondary jungle while his friend went to inspect a fish trap.

The deceased and Rifin went to the same patch of small jungle to shoot barking deer. Others went to the same area to shoot, but independently. The deceased was walking some four or five paces ahead of Rifin when suddenly a shot was fired killing Omar instantly; some of the pellets struck Rifin in the groin. A second shot wounded his thighs. Rifin then saw a man with a gun, moving in the blukar and fired two shots, without effect. Five or six more shots were fired from the blukar, also without effect. The firing was heard and the Penghulu, with a small party, went to the scene. Rifin told them that terrorists had fired at him. The Penghulu took the body and the wounded man to hospital.

On his return, the appellant surrendered and made a statement, the content of which was not proved. Two days later, the appellant made a confession to a magistrate in which he said that while he was waiting for his friend, he saw a figure and fired at once; that he then saw the legs only of another person and again fired; that two shots were then fired at him; that he then fired about eight times to warn the villagers and retreated across the river.

It is remarkable that the accused in his confession, and Rifin in his evidence at the trial some months later, detail the shots fired in exactly the same sequence.

There was some evidence, but not of a convincing character, of friction between the accused and the deceased several years earlier. Both were Home Guards and several of their comrades gave evidence, but there was no suggestion of any recent grievance. There was nothing to show that the accused knew that Omar was likely to go to the spot on that particular morning.

The case made at the trial was that the accused must have recognised Omar and that he shot him purposely, with malice.

The defence was that the accused did not recognise Omar and mistook him for a terrorist.

The accused went into the box and swore that he had challenged the deceased thrice in a loud voice, and received no reply. This was almost certainly untrue. It was quite inconsistent with his confession in which he said that he "fired at once at the moving figure." Had he been challenged, Omar would have stopped and almost certainly answered. The question of challenge was never put to Rifin.